Office-Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1555 & 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

---

MOTION TO AFFIRM

EDWARD R. MACKIEWICZ
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

BARUCH A. FELLNER *
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
Deputy Assistant General Counsel

DAVID F. POWER
MARC L. JORDAN
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-8298

* Counsel of Record

Of Counsel
ERWIN N. GRISWOLD
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

QUESTIONS PRESENTED

1. Whether the decision below, sustaining the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. § 1381 *et seq.*) against attack under the Takings Clause of the Fifth Amendment to the Constitution, should be summarily affirmed by this Court.

2. Whether the decision below, sustaining the multiemployer pension insurance program, including the imposition of premiums (29 U.S.C. §§ 1306, 1307), against constitutional attack, should be summarily affirmed by this Court.

PARTIES

The names of all of the parties to the proceedings below are listed in the Jurisdictional Statement ("J.S.") in No. 84-1555, at 1 n.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
STATEMENT	2
ARGUMENT	6
I. Congressional imposition of withdrawal liability to protect pension plan stability does not violate the Takings Clause	6
II. The multiemployer pension insurance program, including the imposition of premiums, is constitutional	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

Andrus v. Allard, 444 U.S. 51 (1979) 8
Armstrong v. United States, 364 U.S. 40 (1960) 8
Carmichael v. Southern Coal Co., 301 U.S. 495 (1937) 9
Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984) 9
Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980) 10
I.N.S. v. Chadha, 103 S. Ct. 2764 (1983) 10
J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) 9, 10
Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917) 9
Noble State Bank v. Haskell, 219 U.S. 104 (1911) 9
National Railroad Passenger Corp. v. A.T. & S.F. Railway, 53 U.S.L.W. 4285 (March 18, 1985) 8
PBGC v. R.A. Gray & Co., 104 S. Ct. 2709 (1984) ..*passim*
Peick v. PBGC, 724 F.2d 1247 (7th Cir. 1983) 3, 7
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 6, 7
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 8
Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (4th Cir. 1983) 3, 8
Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc., 725 F.2d 843 (2d Cir. 1984) 3
United States v. Locke, 53 U.S.L.W. 4433 (April 1, 1985) 7
United States v. Security Industrial Bank, 459 U.S. 70 (1982) 6
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 7
Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Incorporated, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, No. 84-1443 (April 22, 1985) 3

TABLE OF AUTHORITIES—Continued

ACTS OF CONGRESS AND STATUTES: Page

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 851 (1974) 2, 3, 4
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980) .... *passim*
26 U.S.C. § 401 7
26 U.S.C. § 412 5
28 U.S.C. § 1253 .... 2, 3
28 U.S.C. § 2282 (1970) 2
28 U.S.C. § 2284 2
29 U.S.C. § 186(c)(5) 7
29 U.S.C. §§ 301-309 (1976) 7
29 U.S.C. § 1001 *et seq.* 2
29 U.S.C. § 1031 7
29 U.S.C. § 1082 5
29 U.S.C. § 1306 .... i, 5
29 U.S.C. § 1307 i
29 U.S.C. § 1322A 5
29 U.S.C. § 1381(c)(1) (1976) 10
29 U.S.C. § 1381(c)(2) (1976) 9
29 U.S.C. § 1381 (1982) 5
29 U.S.C. § 1425 5
29 U.S.C. § 1431 5
29 U.S.C. § 1441 5
Pub. L. No. 94-381, 90 Stat. 1119 (1976) 2
Pub. L. No. 98-369, 98 Stat. 494 (1984) 5

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15 2
Rule 24 2

OTHER AUTHORITIES:

H.R. Rep. No. 869, Part I, 96th Cong., 2nd Sess. 57, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4
Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 96th Cong., 1st Sess. (1979) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-1555 & 84-1567

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

WOODWARD SAND CO., INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

On Appeal from the United States District Court for the Central District of California

---

MOTION TO AFFIRM

Appellee Pension Benefit Guaranty Corporation ("PBGC") moves the Court for an order summarily affirming the unreported three-judge court decision of the United States District Court for the Central District of California, on the grounds that the decision below, although on questions not yet directly decided by this Court,[1] is so clearly correct that it does not require further argument.

---

[1] Last term, this Court upheld the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980

STATEMENT

This case presents yet another challenge to the constitutionality of the Multiemployer Act's withdrawal liability provisions upheld in *R.A. Gray, supra.*[2] The Court in *R.A. Gray* underscored "the strong deference accorded legislation in the field of national economic policy," 104 S. Ct. at 2718, and stated that Congress was "eminently rational" in effectuating the legitimate legislative purpose of multiemployer pension plan stability with retroactive

---

("Multiemployer Act"), P.L. No. 96-364, 94 Stat. 1208 *et seq.*, against a claim that their retroactive application violated the Due Process Clause of the Fifth Amendment. PBGC v. R.A. Gray & Co., —— U.S. ——, 104 S. Ct. 2709 (1984) ("*R.A. Gray*"). In *R.A. Gray*, the Court "assume[d] that the prospective effects of the Act [which are challenged in the instant appeals] satisfy constitutional standards." *Id.* at 2717 n.7.

[2] This Court's jurisdiction is based on 28 U.S.C. § 1253 and former 28 U.S.C. § 2282 (repealed by P.L. No. 94-381, 90 Stat. 1119, but applicable to "any action commenced on or before [August 12, 1976]," 28 U.S.C. § 2282 note). The original complaint in this case, filed on June 17, 1975, sought, *inter alia*, an injunction on constitutional grounds against the enforcement of the pension insurance premium provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 851, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Thereafter, in 1980, Congress enacted the Multiemployer Act.

The district court found the premium issues insubstantial and granted summary judgment on those issues to the PBGC without convening a three-judge district court. Plaintiffs appealed, and the Ninth Circuit reversed, ordering a three-judge court to be convened. The plaintiffs then moved to amend their complaint to raise questions as to the constitutionality of the Multiemployer Act, and the amendment was allowed by the district court. The district court also allowed intervention by several employers. Under Rules 15 and 24 of the Federal Rules of Civil Procedure, the district court has authority to allow the amendment and the intervention. Consequently, the questions presented do arise in an "action commenced on or before" August 12, 1976, and, in deciding this motion, the Court need not reach the appropriateness of the orders convening a three-judge court and allowing amendment and intervention.

withdrawal liability. In light of the extensive analysis of the Multiemployer Act in *R.A. Gray* and subsequent denials of certiorari, this Court should summarily affirm the decision of the court below rejecting a secondary attack upon the Multiemployer Act under the Takings Clause as well as other meritless challenges to the pension insurance program.[3]

A. Congress Acts to Protect Employees' Pension Benefits.

In 1974 Congress enacted ERISA. "Among the principal purposes of this 'comprehensive and reticulated' statute was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *R.A. Gray*, 104 S. Ct. at 2713 (citations omitted).

To achieve this goal of protecting "anticipated retirement benefits," Congress created the PBGC to administer separate plan termination insurance programs for single-employer plans and for multiemployer plans. Although

---

[3] The Court also observed in *R.A. Gray* that prospective application of the Multiemployer Act had been upheld by all of the courts of appeals addressing the issue. 104 S. Ct. at 2717 n.7. Subsequently, the Court has denied certiorari in four cases in which courts of appeals rejected challenges to the constitutionality of the Multiemployer Act's prospective operation. Peick v. PBGC, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984); Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc., 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 104 S. Ct. 3554 (1984); Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Incorporated, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, No. 84-1443 (April 22, 1985). In *Peick*, *Republic Industries*, and *Thompson*, the Takings Clause was directly at issue. But for the anomaly of direct appeal under the three-judge court statute, 28 U.S.C. § 1253, it seems likely that the present case would similarly be resolved by a denial of certiorari.

the PBGC's obligation to pay benefits to participants in single-employer plans took effect immediately upon enactment of ERISA, the payment of guaranteed benefits by the PBGC to participants in terminated multiemployer plans was not to become mandatory until January 1, 1978. *See id.* During the period between the enactment of ERISA and January 1, 1978, the PBGC was to have discretionary authority to pay benefits in terminated multiemployer plans. *Id.*[4]

Congress extended the date on which PBGC's mandatory coverage was to become effective four times. "On each occasion, Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer plans." *Id.* at 2714 n.1.

One of the problems considered by Congress was that employer withdrawals from multiemployer plans shifted the responsibility for funding plan benefits to a reduced number of remaining employers, thereby increasing the pressure for additional withdrawals and threatening the plans' viability. Congress therefore sought "an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities." *Id.* at 2714 n.3. The Multiemployer Act's amendments to ERISA were designed to effect Congress' determination that benefits in multiemployer plans are best protected by a regulatory scheme which lessens the need for insurance by "improv[ing] the financial condition" of individual plans. H.R. Rep. No. 869, Part I, 96th Cong., 2nd Sess. 57, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2925, 2931.

---

[4] To fund the insurance program for multiemployer plans, Congress assessed covered plans a premium payable to the PBGC and provided that "any employer withdrawing from a multiemployer plan was subject to a contingent liability [to the PBGC] that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits." *Id.*

In furtherance of this regulatory goal, the Multiemployer Act provides a system of withdrawal liability, which is an obligation of an employer that runs in favor of the plan from which it withdrew.[5] 29 U.S.C. § 1381. The Act also provides for faster funding of promised benefits; 26 U.S.C. § 412, 29 U.S.C. § 1082; and, in some cases, benefit reductions; 29 U.S.C. §§ 1425, 1441. The PBGC continues to insure benefits for participants in multiemployer plans, 29 U.S.C. § 1322A. However, the PBGC's funds for payment of insured benefits are now available for loans to insolvent plans, so that a plan in temporary financial difficulty may continue rather than terminate. 29 U.S.C. § 1431. Finally, annual premiums from covered multiemployer plans were increased over a nine-year period from $.50 to $2.60 per participant. 29 U.S.C. § 1306(a)(3)(A)(ii, iii).

B. The Trustees challenge the constitutionality of ERISA and, later, of the Multiemployer Act.

On June 17, 1975, John Connolly, *et al.*, trustees of the Operating Engineers Pension Trust, filed their original complaint seeking: (1) recovery of premiums paid to the PBGC, (2) a declaratory judgment that the Pension Trust was not covered by the insurance program, and (3) a permanent injunction restraining the PBGC from enforcing the statute against the Pension Trust. On August 16, 1982, the Trustees filed their amended complaint alleging, *inter alia*, that withdrawal liability is an unconstitutional taking of property without just compensation.

Thereafter, appellant Woodward Sand moved to intervene in this case. On December 14, 1982, the district court granted permissive intervention.[6]

---

[5] "Withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of plan assets." *R.A. Gray*, 104 S. Ct. at 2715.

[6] On July 18, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Section

On May 4, 1984, the three-judge court issued its opinion that the Multiemployer Act is facially constitutional. Woodward Sand J.S. at A-15. On December 4, 1984, the court entered its judgment. Woodward Sand J.S. at A-1.

ARGUMENT

I. Congressional imposition of withdrawal liability to protect pension plan stability does not violate the Takings Clause.

In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court held that whether a particular governmental action effects a taking requiring compensation "depends largely upon the particular circumstances." (Citations omitted.) The court below correctly ruled that the "particular circumstances" of this case do not give rise to an unconstitutional taking of property without compensation.

The court below rejected appellants' Takings Clause challenge to this congressional enactment affecting, as it said, "a mere contractual arrangement," Connolly J.S. Appendix at 8. Relying on this Court's decision in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), the court decided that the Takings Clause does not apply to the contract rights involved in the case at bar. On this basis, the court below concluded that appellants' contractual arrangement is not property

---

558(a) of that Act advances the effective date of the Multiemployer Act's withdrawal liability provisions to September 26, 1980, the date of its initial enactment. Woodward Sand claims that its obligation to contribute to the Pension Trust ceased in "September 1980 (although the date is in dispute)." Woodward Sand J.S. at 6. If its obligation to contribute ceased prior to September 26, 1980, then Woodward Sand has no withdrawal liability and may not have any standing to participate in this case.

within the meaning of the Takings Clause. *See Peick v. PBGC*, 724 F.2d at 1274-1276.

Even were it concluded that the contractual right displaced here is "property" within the meaning of the Takings Clause, no compensable taking has occurred here.[7] The history of Congress' actions in the area of pension law negatives any contention that Woodward Sand or any employer had a "reasonable investment-backed expectation," *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 124, that its contracts were not subject to regulation. Congress first announced its intention to regulate the contractual relations between participating employers and multiemployer pension plans when it enacted ERISA in 1974. Even prior to 1974, federal regulation of pension benefits served to put employers on notice that they were subject to congressional regulation if they chose to offer deferred compensation to employees.[8] *See Peick v. PBGC*, 724 F.2d at 1272. The

---

[7] The Court has recently recognized that a threshold constitutional question in a Takings Clause case is one of "affirmative legislative power." United States v. Locke, 53 U.S.L.W. 4433, 4439 (April 1, 1985). In *Locke*, the Court rejected a Takings Clause challenge to a federal enactment requiring the forfeiture of mining claims by those who fail to comply with annual filing requirements. The Court relied heavily on due process analysis and case law, such as *R.A. Gray, supra*, recognizing that "Legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations," quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976).

After applying a due process analysis in holding that "Congress was well within its affirmative powers in enacting" the legislation at issue the Court briefly examined under the Takings Clause "the substantive effect" of the legislation upon those who were deprived of their property, and upheld the law. *Locke*, 53 U.S.L.W. at 4439.

[8] Section 165(a) of the Internal Revenue Code of 1939 (now section 401 of the Internal Revenue Code of 1954, 26 U.S.C. § 401); section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5); Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309, *repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031.

specific method of regulation at issue here, the withdrawal liability provisions, was enacted in 1980, after six years of regulatory experience under ERISA. In sum, the pervasive and extensive history of federal pension legislation apprised employers that they could no longer rely on their contracts to immunize any "reasonable, investment-backed expectations" against legislative modification. *Cf. National Railroad Passenger Corp. v. A.T. & S.F. Railway*, 53 U.S.L.W. 4285 (March 18, 1985).

Woodward Sand argues that Congress should "appropriate and spend money" if it wishes to strengthen the financial condition of multiemployer pension plans. Woodward Sand J.S. at 12. The Takings Clause does not, however, require the Government to "regulate by purchase." *See Andrus v. Allard*, 444 U.S. 51, 65 (1979). Neither does imposing liability on withdrawing employers create a burden "which, in all fairness and justice, should be borne by the public as a whole." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980), *quoting Armstrong v. United States*, 364 U.S. 40, 48 (1961). Rather, the withdrawal liability provisions require the withdrawing employers to complete funding their shares of the plan's unfunded liabilities. *R.A. Gray*, 104 S. Ct. at 2714 n.3, 2715.[9] Accordingly, there can be no doubt that the Multiemployer Act passes constitutional muster under the Takings Clause. *See Republic Industries, supra*, 718 F.2d at 642-643.[10]

---

[9] In fact, the contention that other sources of revenue should be used to "create a central reserve system to assist financially ailing plans" was presented to Congress by Mr. Jett, counsel for appellant Trustees. *Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor*, 96th Cong., 1st Sess. 470 (1979). Congress has, of course, rejected this approach.

[10] Appellants also contend that the Multiemployer Act is unconstitutional because it effects a "taking" for a "private," as opposed

II. The multiemployer pension insurance program, including the imposition of premiums, is constitutional.

The Trustees also argue in this appeal that the requirement that the Pension Trust pay premiums to the PBGC to support the multiemployer termination and insolvency insurance programs violates the Due Process Clause. However, the Trustees cite no case supporting this proposition. On the contrary, this Court long ago upheld the constitutional validity of legislated insurance programs. *Noble State Bank, supra*; *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917); *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937). Therefore, the decision below is consonant with dispositive precedent and it should be summarily affirmed.

Finally, the Trustees contend that Congress delegated to the PBGC unconstitutionally broad authority between 1974 and 1980 with respect to the discretionary payment of multiemployer plan benefits. Despite the Trustees' protestations of overbreadth, Congress delineated a "clear, intelligible principle," *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928), to guide the PBGC in the exercise of its discretionary authority under former 29 U.S.C. § 1381(c)(2) (1976) (now 29 U.S.C. § 1461(c)(2)). That section stated that the PBGC is to pay benefits if it determines "that the payment by [the PBGC] of benefits guaranteed under [Title IV of ERISA] with respect to that plan will not jeopardize the payments the [PBGC] anticipates it may be required to make in connection with [the mandatory guarantee program]." Congress legislated discretionary rather than mandatory coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex

---

to a "public," use. This contention is clearly insubstantial. *See Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984).

issues posed by the termination of multiemployer pension plans." *R.A. Gray*, 104 S. Ct. at 2714 n.1. In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims and it "must be judged according to common sense and the inherent necessities of governmental coordination." *J.W. Hampton*, 276 U.S. at 406.[11]

---

[11] The Trustees' argument that the discretionary authority granted the PBGC between 1974 and 1980 violated the principle of the separation of powers also fails to raise a substantial federal question deserving of plenary consideration. Under former 29 U.S.C. § 1381(c)(1) (1976), the PBGC was required to "notify the Committee on Education and the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate" whenever it exercised its discretionary authority. However, the constitutional scheme of the separation of powers does not require a "hermetic sealing-off of the three branches of government from one another." Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment) (dictum). The requirement that Congress be notified is simply one of those "formal reporting requirements . . . well within Congress' constitutional power." I.N.S. v. Chadha, 103 S. Ct. 2764, 2786 n.19 (1983).

CONCLUSION

Long settled principles and authoritative decisions of this Court resolve the issues raised in this appeal. This Court should summarily affirm the decision of the three-judge court.

Respectfully submitted,

EDWARD R. MACKIEWICZ
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

BARUCH A. FELLNER *
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
Deputy Assistant General Counsel

DAVID F. POWER
MARC L. JORDAN
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-8298

Of Counsel
ERWIN N. GRISWOLD
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939

May 1, 1985

* Counsel of Record